Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Ray Sienkiewicz,

Petitioner,

v.

John McDougall, individually, and Rod Shoap, as Sheriff of Lee County, Florida,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the United States Supreme Court protect the appearance of propriety in a U.S. District Court when the U.S. Court of Appeals has failed to do so, which failure may help a member of that Court of Appeals and other influential persons avoid serious criminal and civil liability?

PARTIES TO THE PROCEEDING

"Petitioner"

Ray Sienkiewicz

"Respondent"

John McDougall, individually, and Rod Shoap, as Sheriff of Lee County, Florida

NOTE TO THE UNITED STATES SUPREME COURT CONCERNING PARTIES IN RELATED ELEVENTH CIRCUIT CASES:

Prospective Petitioners: Ray Sienkiewicz of *Sienkiewicz v. McDougall*, and *Sienkiewicz v. Hart, et al.*, U.S. Court of Appeals No's:, 00-13805-II, and 00-14228-FF, F.A.C.E. actions for intimidating pro-life counselors with problems of judicial impropriety.

Prospective Respondents: John McDougall and Rod Shoap in *Sienkiewicz v. McDougall*. Larry Hart, Janet Reno, William Clinton, Charles Wilson (of the Eleventh Circuit) and Jill Babyack in *Sienkiewicz v. Hart*.

RELATED PETITIONS ALREADY FILED

Meredith T. Raney, Jr. v. Aware Woman Center For Choice, Inc., et al., Supreme Court Number 00-1268.

Jane Roe, II v. Aware Woman Center For Choice, Inc., et al. Supreme Court Number 00-1301.

Meredith T. Raney, Jr. v. City of Melbourne, Florida, Supreme Court Number 00-1350

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Petitioner, Ray Sienkiewicz, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the District Court in *Smith and Sienkiewicz v. McDougall, individually and as Sheriff of Lee County, Florida*, Case Number 99-385-CIV-FTM-21 is shown at Appendix A. The United States Court of Appeals for the Eleventh Circuit, in *Smith and Sienkiewicz v. McDougall, individually and as Sheriff of Lee County, Florida*, Case Number: 00-12634-II, ordered that the appeal be dismissed for lack of jurisdiction; this order is shown as Appendix B. The order of the United States Court of Appeals concerning the petition for rehearing and petition for rehearing *en banc*, which it construed as a motion for reconsideration, is found at Appendix C.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on August 31,2000. The Court of Appeals granted a timely petition for rehearing *en banc*, construed as a motion for reconsideration, on December 7, 2000, and then again dismissed the appeal after reconsideration.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III of the United States Constitution, which states in pertinent part:

Section 1. . The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour .

This case involves the federal statute called Freedom of Access to Clinic Entrances Act, (F.A.C.E.) 18 U.S.C.§ 248, which states in pertinent part:

> (a) **Prohibited activities.** - Whoever -
>
> **(1)** by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
>
> (c) **Civil remedies. -**
>
> **(1) Right of action**.-
>
> **(A) In general.**-Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services . . .
>
> **(e) Definitions.**- As used in this section:
>
> **(1) Facility.**- The term "facility" includes a

hospital, clinic, physicians office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(5) Reproductive health services.- The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

STATEMENT OF THE CASE

A. Background

The related cases for which petitions for writ of certiorari have already been filed with the Supreme Court show that the subject F.A.C.E. violations were the result of local malfeasance, largely restricted to Brevard County, occurring at 1564 Dixie Way, Melbourne, Florida, the site of the *Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516 (1994) injunction. *Meredith T. Raney, Jr. v. Aware Woman Center For Choice, Inc., et al.*, U. S. Supreme Court number: 00-1268; *Jane Roe, II v. Aware Woman Center For Choice, Inc.,et al.*, U.S. Supreme Court number: 00-1301; and *Meredith T. Raney, Jr. v. City of Melbourne, Florida*, U.S. Supreme Court number: 00-1350

The final three petitions for writ of certiorari , of which this is first, will reveal a brilliant, but evil, scheme to trade political or economic benefits from the abortion industry for an illegal nation-wide program of intimidation of pro-life referral counselors. This program was initiated by the highest officials of our country and orchestrated by elements of the U.S. Department of Justice. The effect of this scheme was

more business for abortion clinics, and more dead or injured women because of the absence in abortion facilities of independent, truthful referral counselors.

In the spring of 1997, Lee County Sheriff's deputies asked the pro-life counselors at the Azima abortion facility in North Ft. Myers, Florida, to talk to then-Sheriff John McDougall about their legal rights. They did so.

Following his research of current state and federal law, which included the advice of able legal counsel, McDougall publicly acknowledged that the pro-life counselors had the right to provide their services on the sidewalk at the doorway to the Azima clinic. One of the cases reviewed by McDougall was the *Schenck* decision, then just recently decided by the U.S. Supreme Court. *Schenck v. Pro Choice Network*, 519 U.S. 357 (1997). Another case he studied was *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995), brought against Janet Reno and Charles Wilson, which included a determination by the Court of Appeals that F.A.C.E. was valid as an exercise by Congress of its Commerce Clause powers.

In later months, the pro-life counselors working at the Azima facility completed a training course for referral counselors. They also joined a professional organization for referral counselors. Thereafter, they carried identification as referral counselors and were able to display their credentials to any interested person. A great many desperate women were helped with their crisis pregnancies at the Azima facility by these loving, courageous people.

Two years later, in May, 1999, McDougall told two of the referral counselors that their activities at the Azima facility would be stopped when Charles Wilson, then the U.S. Attorney for the Middle District of Florida, got his "deal" worked out; the counselors would then be threatened with

arrest for trespassing at Azima's. This change would occur because the "top people in Washington" wanted the counselors stopped.

In July, 1999, after Charles Wilson was appointed to the Court of Appeals, but before he was sworn in, the pro-life counselors at Azima's were threatened with arrest and barred from the facility. No other pro-life persons at the facility were so threatened. McDougall and John Doe and Jane Doe were then sued for F.A.C.E. violations by the two counselors. However, the key element to the success of this hellish scheme was in place: Wilson was now at the Court of Appeals where just his presence could influence rulings in the courts of this circuit, appellate as well as the district courts.

A tragic development occurred in August, 2000, about a week before the Court of Appeals' decision: a pregnant mother reportedly died of mistreatment at the Azima abortion facility. Happening as it did during alleged F.A.C.E. violations, the criminal liability may be as much as life in prison for those responsible, including a member of the court of appeals, as the criminal activity predates his appointment to the bench.

B. The Proceedings Below

After the F.A.C.E. - violation complaint was filed, McDougall responded with a motion to dismiss which was opposed by the counselors. The trial docket shows a period of several months with little activity. Strangely, there was no order by the magistrate requiring that the interested persons be identified.

Correspondence between counsel precipitated the filing of the request for disqualification under 28 U.S.C. §455. There was no basis for a motion under 28 U.S.C. §144 because

the initial concern was prompted by an anonymous communication.

The counselors had grown even more concerned when the magistrate submitted a report and recommendation to the district judge in which he distorted a key element of the case, stating that the counselors "do not claim to be counseling in a facility". Just the opposite was true. It appeared that the magistrate was seeking to torpedo the case as 18 U.S.C. §248 (F.A.C.E.) requires that the referral services were to be performed "in a facility".

Instead of disqualifying himself, the magistrate entered an order presenting some reasons for not doing so. This order, instead of allaying the fears that the magistrate was subject to extra-judicial pressures which would result in favoritism toward McDougall or prejudice against the counselors, simply confirmed their worries: the magistrate's wife was an advisor to McDougall, paid an unspecified amount of money for unspecified services.

An immediate appeal to the U.S. Court of Appeals, Eleventh Circuit, was taken.

The Court of Appeals received a complete briefing, including a requested brief on jurisdiction. One of the key reasons for an immediate review by the Court of Appeals was the need to avoid even the appearance of impropriety in the district court in a case of national importance.

A panel of appellate judges, which included Charles Wilson, dismissed the appeal without addressing the core issue of the court's inherent authority to maintain the appearance of propriety in the district court. A petition for rehearing en banc was construed as a motion for reconsideration by two of the members of the original panel, granted and then the appeal

was once again dismissed.

REASON FOR GRANTING THE WRIT

The petition should be granted because the United States Supreme Court should protect the appearance of propriety in a U.S. District Court when the U.S. Court of Appeals has failed to do so, which failure may help a member of that Court of Appeals and other influential persons avoid serious criminal and civil liability.

An objective observer could easily believe that the magistrate was being paid - indirectly - to sabotage this case in the district court. Worse, an objective observer could easily believe that a judge on the court of appeals was also influencing - directly or indirectly - the outcome of this case. Can Ray Sienkiewicz prove that these situations exist, beyond and to the exclusion of any reasonable doubt? Of course he can not, at least at this point in time. However, this appearance of impropriety in the district court and the court of appeals casts an ugly shadow over a case of national importance involving powerful politicians, federal judges, the abortion industry, and the lives and health of millions of desperate pregnant women.

Several months ago, Chief Justice Rehnquist filed a statement in *Microsoft Corporation v. United States*, U.S. Supreme Court number: 00-139 and *New York v. Microsoft Corporation*, U.S. Supreme Court number: 00-261 in which he explained that he would not recuse himself from hearing those appeals because his son was an attorney in a firm representing Microsoft on other matters.

That situation differs greatly from the one at hand There is nothing known about the *Microsoft* appeals that could threaten the Chief Justice with criminal charges nor cause a

superior judge and his powerful benefactors to spend the rest of their lives in prison.

It would be far-fetched to believe that the Rehnquists, father and son, shared a joint bank account as is the livelihood of the magistrate and his wife, nor that they, the Rehnquists, engage in the kind of intimate conversations as would the magistrate and his wife. Nor is the younger Rehnquist shown to have the level of contact needed to provide a conduit for a flow of messages between Bill Gates and the Chief Justice.

There is no factual situation quite like the present one in recent U. S. Supreme Court decisions dealing with the appearance of impropriety in federal courts.

The facts in *Liteky v. United States*, 114 S.Ct. 1147 (1994), concern defendants who were convicted of criminal mischief on a military base in Georgia. They argued that the district judge had become prejudiced against them due to his conduct of a previous trial with one of the defendants. Much of the discussion in this opinion concerns the "extrajudicial source" doctrine recited in *United States v. Grinnell Corp.*, 86 S.Ct. 1698, 1710 (1966), which is said to be "a source outside the judicial proceeding at hand". *Liteky* (*supra*) page 1152.

Ray Sienkiewicz believes that the deep seated antagonism that will make a fair judgment impossible herein arises from the financial relationship (however indirect) between the magistrate and McDougall, such being an "extrajudicial source". And whatever bias against him exists at the court of appeals arises from the massive threat of civil and criminal liability for one of the judges there. Once again, an "extrajudicial source" is responsible.

An earlier case, *In Re Murchison*, 75 S.Ct. 623 (1955),

dealt with a contempt proceeding conducted by the same Michigan judge who sat as the "judge-grand jury" in the same case. There the U. S. Supreme Court reversed the Supreme Court of Michigan, saying that no man can be a judge in his own case. This Court was concerned not only about the probability of unfairness, but also the perception that justice was being done saying: "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice'", citing *Offutt v. United States*, 75 S.Ct. 11, 13.

No reasonable person, observing the present case, would believe that the "appearance of justice" was being maintained in either the district court or in the court of appeals.

For one thing, the Court of Appeals said nothing whatsoever about its inherent right to review a case for problems of judicial impropriety even if the order appealed from is not statutorily appealable, when dealing with a case of great significance.

The Court of Appeals, Fifth Circuit, did not hesitate to rule that the interlocutory appeal in *In Re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (1980), had no procedural basis and should be dismissed because, under normal circumstances, a party aggrieved by judicial bias should wait until the case's outcome is finally decided before seeking appellate review. And yet, that Court of Appeals made an exception and considered the question of the judge's disqualification because of "the extraordinary stakes involved" and because a later consideration of this question would otherwise arise later. *Corrugated* (*supra*) footnote 1 on page 960.

Clearly there is no doubt that the questions of judicial impropriety must be dealt with in the present case. In accord with the *Corrugated* (*supra*) decision, the Eleventh Circuit

should have reviewed the problems with the magistrate and corrected the appearance of impropriety at that time. Such a response, particularly if Charles Wilson had been excluded from the decision, would have done much for the appearance of propriety in the Eleventh Circuit.

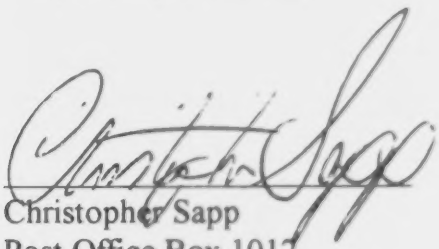
None of the cases reviewed here deal with criminal wrong-doing on the part of any judge. Questions raised, if not conclusively answered in this case, about possible culpability for felonious conduct should require the immediate attention of the United States Supreme Court in a decisive move to assure all observers that a case with these "extraordinary stakes involved" will be completely free of any appearance of impropriety.

Our Constitution requires "good Behaviour" of federal judges. Article III, Section 1. The ultimate responsibility to maintain that standard must be borne by this Court.

CONCLUSION

Ray Sienkiewicz respectfully requests that this Court grant a writ of certiorari in order to protect the appearance of propriety in both the district court and the circuit court of appeals. The beneficiaries of his civil action are the millions of desperate women dealing with crisis pregnancies who are being deprived of the help and information provided by pro-life referral counselors, to the detriment of their lives and health.

Respectfully submitted,



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APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

Case No. 2:99-cv-385-FtM-21D
(Filed May 11, 2000)

ROBERT SMITH, ET AL.,
Plaintiffs,

vs.

JOHN MCDOUGALL, INDIVIDUALLY AND AS SHERIFF OF LEE COUNTY, FLORIDA,
Defendants.

ORDER

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION: REQUEST FOR DISQUALIFICATION OF MAGISTRATE (Doc. No. 14)

FILED: May 8, 2000

THEREON it is ORDERED that the motion is DENIED.

The Plaintiffs file this Request for Disqualification of Magistrate (Doc. No. 14) on the grounds that the "Plaintiffs reasonably believe that the impartiality of the magistrate may be questioned" based upon the Report and Recommendation

which granted the Defendant's Motion to Dismiss and based upon attorney Christopher Sapp's allegations that anonymous sources have informed him that I help my wife "run her psychological counseling service" and that her "main customer for this service is Sheriff John McDougall." (See, Doc. 14, p.1, and Exh. B) The Plaintiffs cite no law in their request.

Title 28 U.S.C. §455 provides in pertinent part:

> (a)Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b)He shall also disqualify himself in the following circumstances:
>
> (4)He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

My wife is a clinical psychologist (Psy.D) that has an office in Naples, Florida. In the past, she has provided pre-employment testing, fitness for duty, and pro bono critical incident debriefings for a number of law enforcement agencies in Southwest Florida which include the Lee County Sheriffs Office. Sheriff John McDougall is not her "main customer" nor is the Lee County Sheriff's Office the main source of my wife's practice. The allegation that I help my wife "run her psychological counseling service" is incorrect. The identity, evaluations, and counseling of my wife's patients are confidential and privileged. I have no access to this information. The outcome of this case will not substantially effect my wife's practice in any way. The ruling in the Report and Recommendation was based entirely upon the law.

I do not believe that my impartiality might be reasonably questioned in this case.

Therefore, it is hereby **ORDERED**:

That the Request for Disqualification of Magistrate (Doc. 14) is hereby **DENIED**.

DONE and **ORDERED** in Chambers in Ft. Myers, Florida this 11th day of May, 2000.

/s/
DOUGLAS N. FRAZIER
UNITED STATES
MAGISTRATE JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Parties

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-12634-II

(Filed August 31, 2000)

ROBERT SMITH,
RAY SIENKIEWICZ,

Plaintiffs-Appellants,

versus

JOHN MCDOUGALL, individually and
as Sheriff of Lee County, Florida,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

Before: BLACK, HULL, and WILSON, Circuit Judges.

BY THE COURT:

This appeal is DISMISSED for lack of jurisdiction. Decisions by magistrate judges pursuant to 28 U.S.C. §636(b) that have not been adopted and rendered final by the district court are not appealable. See Perez-Priego v. Alachua County, 148 F.3d 1272, 1273 (11th Cir. 1998); Donovan v. Sarasota Concrete Co., 693 F.2d 1061, 1066-67 (11th Cir. 1982). The magistrate's order denying disqualification was not appealable because the district court did not rule upon the motion or adopt the magistrate's decision. Moreover,

disqualification issues are reviewable following the entry of judgment, and thus, are not appealable collateral orders under Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). See In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 960-61 (5th Cir.), cert. denied, 449 U.S. 888 (1980).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12634-II

(Filed Dec. 07, 2000)

ROBERT SMITH,
RAY SIENKIEWICZ,

Plaintiffs-Appellants,

versus

JOHN MCDOUGALL, individually and
as Sheriff of Lee County, Florida.

Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

Before: BLACK and HULL*, Circuit Judges.

BY THE COURT:

The appellants' September 21, 2000, petition for rehearing en banc, construed as a motion for reconsideration of our August 31, 2000, order dismissing this appeal for lack of jurisdiction, is GRANTED. The August 31, 2000, order is hereby VACATED. Upon reconsideration, this appeal is DISMISSED for lack of jurisdiction. Decisions by magistrate judges pursuant to 28 U.S.C. §636(b) that have not been

*Judge Wilson has recused and this order is being entered by quorom. See 11th Cir. R. 34-2

adopted and rendered final by the district court are not appealable. See Perez-Priego v. Alachua County, 148 F.3d 1272, 1273 (11th Cir. 1998); Donovan v. Sarasota Concrete Co., 693 F.2d 1061, 1066-67 (11th Cir. 1982). The magistrate's order denying disqualification was not appealable because the district court did not rule upon the motion or adopt the magistrate's decision. Moreover, disqualification issues are reviewable following the entry of judgment and, thus, are not appealable collateral orders under Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). See In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 960-61 (5th Cir.) cert. denied, 449 U.S. 888 (1980).